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IN THE

Supreme Court of the United States

October Term, 1986

WHITE PLAINS AUTOMOTIVE SUPPLY CO., INC. and DORLEE PROPERTIES CORP.,

Appellants,

against

CITY OF PEEKSKILL,

Appellee.

On Appeal from the Court of Appeals, State of New York

MOTION TO DISMISS

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GROUNDS FOR DISMISSAL

Pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, Appellee moves the Court to dismiss the appeal herein on the ground that the judgment of the Court of Appeals, State of New York rests on an adequate non-federal basis as hereinafter set forth.

STATEMENT OF THE CASE

In 1978, Appellant Dorlee Properties Corp. acquired its property in the Town of Cortlandt located directly to the south of a residential neighborhood known as Bleloch Park in the City of Peekskill, with the full knowledge and actual notice that the only means of access to its property was through such residential neighborhood. The property had had alternate access from Route 9A prior to the construction of a four-laned limited access highway known as the Route 9 Bypass. The trial record indicates that owners prior to Appellants' tenancy had received compensation from the State of New York at the time of cutoff of alternate access.

Appellants' business increased steadily year after year. With approx-

imate gross sales of five million dollars in 1976 when it had been tenant on the property, Appellant White Plains Automotive Supply Co., Inc. grew into an over nine million dollar business in 1982.

Commencing in early 1981, Appellee began receiving numerous complaints from the residents of the Bleloch Park neighborhood concerning tractor-trailer trucks serving Appellants' property. The streets in the neighborhood are twenty to twenty-five feet in width and the blocks are very short averaging eighty to eighty-five feet in length. Eighteen-wheeler trucks were observed crossing both lanes of traffic, jumping curbs and mounting sidewalks in order to negotiate turns. The roads, curbs, sidewalks, sewer lines and storm drains began to deteriorate in the Bleloch Park neighborhood, particularly at

intersections. The vibrations of the trucks which weigh fifteen tons when empty and thirty-five tons when full caused plaster walls to crack in homes in the neighborhood and stones in exterior retaining walls to weaken and fall. The limbs of several large street trees were destroyed, telephone poles were sideswiped, and street signs were struck by the trucks. The residents were subjected to the noise of revving engines at intersections and the exhaust from diesel truck engines. Many of the homes in the neighborhood are located only twenty feet from the roadway and the residents kept their windows closed to prevent the intrusion of oily exhaust fumes.

Appellee undertook negotiations with the Appellants, the New York State Department of Transportation, State Senator Mary Goodhue, and the Town of

Cortlandt in which Appellants' operations were located to provide alternate access to the property other than through the Bleloch Park neighborhood, which efforts proved fruitless. Appellee proposed alternate sites for Appellants' operations, which overtures were rejected. Appellee studied the feasibility of widening certain streets within the Bleloch Park neighborhood but concluded, as confirmed by the trial court's personal inspection, that such rebuilding would be almost impossible due to the proximity of many homes to the street, the resultant intrusion into their front-yards, and sight distance limitations caused by retaining walls.

Having explored these alternatives, Appellee concluded that the only way by which the health, safety, and welfare of the neighborhood could be adequately protected would be through the enactment

of size restrictions on trucks traversing the neighborhood, as enabled under Section 1640(a) (5 and 20) of the Vehicle and Traffic Law of the State of New York.

ARGUMENT

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of this cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. (citations omitted) Where the judgment of the State court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. Lynch v. New York, 293 US 52, 54-55.

Appellants have argued throughout this case that Appellee's truck length restrictions deprive Appellants of private property without due process

of law and just compensation in violation of the State and Federal constitutional guarantees contained in Article 1, Sections 6 and 7(a) of the New York State Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

The pertinent provisions of Article 1, Sections 6 and 7(a) of the State Constitution which read as follows are nearly identical to the Fifth and Fourteenth Amendment protections:

> No person shall be deprived of life, liberty or property without due process of law.
> ....
> Private property shall not be taken for public use without just compensation.

The decisions of the trial court and the appellate court, as affirmed by the Court of Appeals of the State of New York, uphold the constitutionality of the truck length restrictions as

promoting the health, safety, and welfare of the community and as outweighing the hardship experienced by Appellants due to such enactment. The only reference to the Federal due process and taking clauses found in the Appellate Division decision is in tandem with the parallel State provision. White Plains Automotive Supply Co., Inc. v. City of Peekskill, 115 NY AD 2d 728, 730, 497 NYS 2d 389 (2nd Dept.). The trial court decision contains no reference to either the State or Federal due process and taking clauses. Neither decision contains Federal citations in support of its due process and taking findings. Rather, both decisions rely extensively on and affirm the prior New York Court of Appeals holding in Bakery Salvage Corp. v. City of Lackawanna, 24 NY 2d 643, a case uncannily close on the facts to the instant case and decided

solely on State grounds. The traffic ordinance provisions challenged in Bakery Salvage, also restricted the size of trucks on certain residential streets, as enabled under Section 1640(a) (5 and 20) of the New York State Vehicle and Traffic Law.

The decision of this Court in Jankovich v. Indian Toll Road Commission 379 US 487 (1965) should control. That case held that "...even through a State court's opinion relies on similar provisions in both the State and Federal Constitutions, the State constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the State judgment." at 492. See also, Cramp v. Board of Public Instruction, 368 US 278; Perkins v. Benguet Mining Co., 342 US 437; Missouri v. Mayfield, 340 US 1; Minnesota

v. National Tea Co., 309 US 551; Tax Commission v. Van Cott, 306 US 511; Fox Film Corp. v. Muller, 296 US 207.

CONCLUSION

For the foregoing reasons, Appellee moves that this appeal be dismissed.

Dated: Peekskill, New York
March 5, 1987

Respectfully submitted,

WILLIAM J. FLORENCE, JR.

On the Motion:
Bernis S. Nelson